Petition

81-1375

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1981

KERR-McGEE REFINING CORPORATION,
Petitioner,

VERSUS

LEON THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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January, 1982

QUESTIONS PRESENTED

1. Whether there exists a direct conflict, which must be resolved by the Supreme Court, between the holding of the United States Court of Appeals for the Tenth Circuit that petitioner was liable for damages because it failed to strictly comply with the notice provisions of the Petroleum Marketing Practices Act (the "Act"), 15 U.S.C. § 2804, and the decision of the United States Court of Appeals for the First Circuit in *Veracka* v. *Shell Oil Co.*, No. 80-533-9 (D. Mass. 1980), *aff'd*, 655 F.2d 445 (1st Cir. 1981), which holds that strict compliance with the notice provisions of Section 2804 is not mandatory under all factual situations.

2. Whether there exists a direct conflict, which must be resolved by the Supreme Court, between the opinion of the United States Court of Appeals for the Tenth Circuit in this case construing, interpreting and applying 15 U.S.C. § 2802(b)(3)(A) and the decision of the United States Court of Appeals for the Third Circuit in *Ferriola* v. *Gulf Oil Corp.*, 496 F.Supp. 158 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3rd Cir. 1981), and the decision of the United States Court of Appeals for the Second Circuit in *Bellmore* v. *Mobil Oil Corp.*, 524 F.Supp. 850 (D. Conn. 1981), *aff'd*, No. 81-7491 (2d Cir. 1981), when the Tenth Circuit failed to use the "subjective good faith standard" in determining whether or not the petitioner's change in its rental program was in compliance with Section 2802(b)(3)(A) of the Act.

LIST OF ALL PARTIES

All parties appear in the caption of the case. Kerr-McGee Refining Corporation is a wholly owned subsidiary of Kerr-McGee Corporation. Kerr-McGee Refining Corporation's wholly-owned subsidiary, Triangle Refineries, Inc., has an interest in the following: San-Ann Premium Center, Inc., and San-Ann Service, Inc.

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In the
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KERR-McGEE REFINING CORPORATION,
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VERSUS

LEON THOMPSON,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, *Leon Thompson* v. *Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981), is attached as Appendix A. The Circuit Court's judgment is attached as Appendix B. The Circuit Court's Order Denying Stay of Mandate is attached as Appendix C. The Circuit Court's letter directing filing of mandate is attached as Exhibit D. The order of the Court of Appeals denying petitioner's Petition for a Rehearing or for Rehearing *en banc* is attached as Appendix E. The District Court's Order denying new trial and judgment notwithstanding the verdict is attached as Appendix F. The District Court's Judgment is attached as Appendix G.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on September 24, 1981. Timely application for rehearing was denied by the Circuit Court on October 26, 1981. This Petition for the Issuance of a Writ of Certiorari to review the Circuit Court's September 24, 1981 opinion, was filed within ninety (90) days of the denial of rehearing by the Circuit Court.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

The Petroleum Marketing Practices Act (the "Act"), 15 U.S.C. § 2801, *et seq.*, became effective June 19, 1978, and provides in the relevant sections as follows:
Section 2802(b)(1):

> "Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if —
>
> (A) the notification requirements of section 2804 of this title are met; and
>
> (B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3)."

Section 2804:

> "Notification of termination or nonrenewal of franchise relationship—General requirements applicable to franchisor.
>
> (a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor

shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c) of this section; and

(2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

* * *

Manner and form of notification

(c) Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination on nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions. Pub.L. 95-297, Title I, § 104, June 19, 1978, 92 Stat. 329."

Section 2802(b)(3)(A):

"For the purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship."

STATEMENT OF THE CASE

This case involves the interpretation of a new statute which has not been reviewed by this Court. From 1968 to 1978, a contractual relationship existed between Kerr-McGee Refining Corporation, petitioner, an independent gasoline supplier/franchisor, and Leon Thompson, respondent, a lessee-dealer/franchisee. As a part of the court approved settlement of a 1976 lawsuit in the United States District Court for the Western District of Oklahoma between petitioner and respondent and other dealers, respondent received the service station lease that was in effect at the time he filed suit. The lease was different from those executed with other lessee-dealers in that it was for a fixed term of two (2) years and contained no provision for renewal or for notice of expiration. The lease approved by the court was to expire without notice on August 31, 1978.

In February 1977, petitioner adopted a new marketing program for all of petitioner's lessee-dealers. The new marketing program changed the way rent on service stations was to be calculated. Under the old program, rent flucuated according to the number of gallons of gasoline sold and the electric bill was paid in part by petitioner and in part by the lessee-dealers. Under the new marketing program, rent was set at a flat monthly rate, and the lessee-dealer would pay the electric bill.

The new marketing program caused an increase in the monthly rent of most service stations. To help off-set the initial impact, each dealer was to receive an average reduction of two cents ($0.02)) per gallon in the cost of gasoline. Respondent had not had a rental rate increase

since January, 1969. The new marketing program would have had the net effect of increasing his rent approximately Fifty-Four Dollars ($54.00) per month.

The new marketing program was offered to all existing lessee-dealers. It was accepted by all except respondent. Petitioner's district representative first offered the new marketing program to respondent on January 22, 1978. Respondent signed a statement rejecting the new program that same day. Respondent was immediately informed that the same new marketing program would be offered again in August to renew the expiring agreement.

On June 19, 1978, the Petroleum Marketing Practices Act became effective immediately upon being signed by President Carter. Pertinent sections of the Act have been set out above.

On July 28, 1978, petitioner delivered written notice to respondent advising him that the business relationship then existing would not be renewed on August 31, 1978, because of a failure to agree to new terms. The new terms mentioned in this notice were those of the new marketing program which petitioner had initiated in February, 1977 and which were previously offered to and rejected by respondent.

On August 31, 1978, respondent brought an action against petitioner in the District Court for Oklahoma County alleging that petitioner's actions violated the Petroleum Marketing Practices Act. Respondent sought to restrain petitioner from evicting him from the service station, to compel renewal of the existing agreement on his

terms and to recover actual and punitive damages. The state court granted respondent an ex parte Temporary Restraining Order.

Petitioner removed the case to the United States District Court for the Western District of Oklahoma where the Temporary Restraining Order was dissolved on September 18, 1981. Respondent was ordered by the trial court to vacate the service station by September 22, 1978, which he did.

There ensued various motions not at issue here. Respondent's Motion for Summary Judgment and petitioner's Cross-Motion for Summary Judgment were denied on July 30, 1979. The parties filed a Joint Petition for Reconsideration of Their Motions and for Hearing Thereon, which the trial court again denied on August 22, 1979. The case was then tried to a six-person jury beginning September 18, 1979.

Petitioner's Motion for Directed Verdict was granted only as to punitive damages September 19, 1979, and respondent's Motion for Directed Verdict and Reconsideration of Punitive Damages was denied the same day. The trial court overruled petitioner's Motions for a Directed Verdict at the conclusion of respondent's evidence and at the conclusion of all evidence.

The jury returned a verdict in favor of respondent in the amount of $18,500. Timely Alternative Motions for Judgment Notwithstanding the Verdict, or for a New Trial were made. Both were denied by the court on November 19, 1979 (Appendix F). Petitioner filed its Notice of Appeal on December 14, 1979.

All briefs were filed with the Court of Appeals on April 11, 1980, and a Supplemental Brief on July 10, 1981, seven (7) days prior to oral argument on July 17, 1981.

On September 24, 1981, the Court of Appeals issued its opinion affirming the Order of the trial court (Appendix A). The Court of Appeals held that the trial court properly overruled petitioner's motion for directed verdict and judgment notwithstanding the verdict because the court could ". . . find no evidence that Kerr-McGee complied with the [PMPA] notice requirements" (Appendix A, p. 18a). The Court of Appeals further held: "There was substantial evidence that Kerr-McGee's change of the lease terms was not in good faith" (Appendix A, p. 21a).

REASONS FOR GRANTING THE WRIT

The ruling of the Tenth Circuit Court of Appeals in this case requires the review of this Court because this case involves the interpretation of a new statute which has not been reviewed by this Court and that this Circuit Court opinion is erroneous and conflicts with decisions in other circuits.

1. SECTION 2802(b)(1)(A) PROVIDES THAT NONRENEWAL OF A FRANCHISE RELATIONSHIP IS PERMITTED WHEN THE FRANCHISOR SATISFIES SECTION 2804 NOTICE REQUIREMENTS. THE COURT OF APPEALS ERRONEOUSLY HELD THAT STRICT COMPLIANCE WITH NOTICE REQUIREMENTS IS MANDATORY.

Section 2804(c) requires franchisors to furnish the notice of nonrenewal (1) in writing, (2) posted by certified mail or personally delivered, and (3) containing: (a) a statement of intent not to renew, together with the reasons therefor, (b) the effective date of nonrenewal, and (c) a summary statement of the provisions of the applicable law. This notice must be given not less than ninety (90) days prior to the effective date of nonrenewal. Where circumstances render it unreasonable for the franchisor to furnish notice not less than ninety (90) days prior to the date of nonrenewal, Section 2804(b)(1)(A) provides that the notice be given on the earliest date reasonably practicable.

The effective date of the Act was June 19, 1978. The lease expired August 31, 1978. There were seventy-three (73) days between the effective date of the Act and the expiration date. It was not possible for petitioner to provide respondent with ninety (90) days' notice of nonrenewal.

The Court of Appeals, relying on *Blankenship* v. *Atlantic-Richfield Co.*, 478 F.Supp. 1016 (D. Ore. 1979), *Davy* v. *Murphy Oil Corp.*, 488 F.Supp. 1013 (W.D. Mich. 1980), *aff'd* No. 80-1285 (6th Cir. 1981), and *Daniels* v. *Dilmar Oil Co.*, 502 F.Supp. 178 (D.S.C. 1980), held as a matter of law that petitioner failed to strictly comply with the notice requirements in two respects: first, that it was "obvious" that petitioner did not give notice as soon as practicable because notice was not given for thirty-nine (39) days after the effective date of the Act (Appendix A, p. 19a), and second, petitioner failed to give notice by not furnishing respondent a summary statement (Appendix A, p. 19a).

The Court of Appeals' application of the rules set out in *Blankenship, Davy* and *Daniels* was erroneous and inappropriate. Those cases are clearly distinguishable from the present action. In each of those cases, the defendant/franchisor sought to terminate or nonrenew a franchise agreement that was entered into at least six (6) months *after* the effective date of the Act. These courts were not required to consider the effects the Act had on franchise agreements entered into prior to the effective date of the Act.

The Court of Appeals disregarded more recent existing case authority holding that the Act does not mandate strict compliance with notice provisions in *all* factual situations. In *Veracka* v. *Shell Oil Co.*, No. 80-533-S, slip op. (D. Mass. Nov. 26, 1980), *aff'd* 655 F.2d 445 (1st Cir. 1981), the trial judge found that:

> "Technical violation of the notice provision Section 2802(b)(2)(C) does not defeat [Shell's] right not to renew the franchise and lease." Slip Opinion, p. 4.

In *Gaspar* v. *Chevron Oil Co.*, 490 F.Supp. 971 (D.N.J. 1980), the following appears:

> "In light of the fact that the contracts between the parties were entered into prior to the enactment of the PMPA, this Court does not demand strict compliance by the franchisor with each and every notice requirement. *Sachi* v. *Mobil*, No. 79 C2345 (E.D.N.Y. Nov. 20, 1979), 1980-1 Trade Cases, ¶ 63,044, *Frisard* v. *Texaco*, 460 F. Supp. 1094 (E.D. La. 1978).
>
> * * *
>
> "It would have been impossible for *Chevron* to have anticipated years before its approval, every requirement of the PMPA. For this reason the court deems immaterial any failure of strict compliance with Section 2802(c)(4) and excuses the defendant from less than perfect adherence thereto."

The Act was enacted to remedy the effects of disparate bargaining power between franchisor and franchisee and to establish uniform national guidelines for the conduct of franchise relationships by attempting to prevent coercive or unfair franchisor practices. *Scheele* v. *Mobil Oil Corp.*, 510 F.Supp. 633 (D. Mass. 1981); *Veracka, supra.* The goal of the Act was to ensure that franchisees were not arbitrarily terminated and that they were made aware of their rights under the Act. The Act altered business practices and relationships that had evolved over the course of more than fifty (50) years. When the Act became effective, it was necessary for franchisors to review and revise their practices to comply with the provisions as enacted.

Petitioner believes that this Court can appreciate the position into which franchisors were placed. It took time to review all aspects of the franchise relationships and make

the necessary changes. Petitioner believes that it is not "obvious", but rather an arbitrary and erroneous conclusion by the Court of Appeals that petitioner failed to give notice "as soon as practicable" merely because it took thirty-nine (39) days for petitioner to conduct its review and to give respondent a written notice of nonrenewal.

Respondent can hardly complain of prejudice as a result of the thirty-nine (39) day delay. Respondent testified that he had two (2) years' notice of the termination of the franchise, and he received at least three (3) notices — January 22, July 28 and August 15, 1978 — that the franchise agreements would not be extended beyond August 31, 1978, unless they were renewed according to the terms of the uniform new marketing program.

The court also erred in holding that petitioner did not comply with the notice provisions by not furnishing respondent a summary statement as required by Section 2804 (c)(3)(C) and (d)(2). The Court of Appeals relied on *Scheele, supra,* in holding that compliance with the summary statement requirement was also mandatory (Appendix A, p. 19a).

In *Scheele,* the court held:

> "Since the statute requires that the summary statement be published in the Federal Register within thirty days of June 19, 1978, 15 U.S.C. § 2804(d)(1), and this was in fact done, it was possible for defendant to comply with the provisions of the Act."

The trial judge in *Scheele* was incorrect. The summary statement required by the Act was not published in the Federal Register until August 30, 1978.

The Court of Appeals held that:

> "The requirement of furnishing a summary statement involves no judgment by the court as to practicability. The inquiry is simply whether the statement was furnished not later than five (5) days after its publication. 15 U.S.C. § 2804(d)(2). In so providing, Congress considered the plight of franchisors immediately after the Act became effective and determined a practicable deadline for interim notice of the contents of the Act. This court does not have the power to blot out these timing requirements as to notice and summary statement." (Appendix A, p. 20a)

Petitioner asserts that the Court of Appeals' opinion results in an illogical and mechanical application and construction of the notice provisions of the Act. The Court of Appeals would require petitioner to cause to be delivered to respondent a copy of the summary statement within five (5) days of August 30, 1978. Applying the Court of Appeals' mechanical construction of the notice required, five (5) days after August 30 was September 4 — Labor Day. Further, the record reveals that the August 30, 1978 edition of the Federal Register was received in Oklahoma City on September 5, 1978, rending impossible any compliance by petitioner prior to respondent's filing suit on August 31, 1978.

Petitioner asserts that the purpose of requiring that a summary statement be sent to the franchisee is to ensure that the franchisee is apprised of his legal rights under the Act. Respondent can hardly complain that he was prejudiced or unaware of his legal rights by not receiving a copy of the summary statement from petitioner. In fact, respon-

dent testified that he did not need it. He wanted it for his attorney. Under the unique factual situation herein presented, petitioner contends that the Court of Appeals erred.

2. SECTION 2802(b)(3)(A) PROVIDES THAT ONE OF THE GROUNDS FOR NONRENEWAL OF A FRANCHISE RELATIONSHIP IS FAILURE TO AGREE ON CHANGES IN THE FRANCHISE IF THE CHANGES ARE MADE IN GOOD FAITH. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THERE WAS SUBSTANTIAL EVIDENCE THAT THE CHANGE OF LEASE TERMS WAS NOT IN GOOD FAITH AND NOT FOR A REASON OUTLINED IN THE ACT.

Section 2802(b)(3) specifies permissible grounds for nonrenewal of a franchise relationship. The only issue here is whether petitioner's reason for nonrenewal satisfies only one of those grounds — the failure to agree to changes or additions to the provisions of the franchise as set out in Section 2802(b)(3)(A). Failure to agree to changes or additions to a franchise relationship constitutes a complete and valid ground for nonrenewal when:

> "(i) the changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and
>
> "(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship."

Petitioner contended that the reason for nonrenewal was failure to agree on new terms made in good faith and in the normal course of business. Respondent contended that the changes or additions were not made in good faith.

The Second and Third Circuits, the only other circuits which have considered "good faith" of franchisor in changing rent, have construed the statute to mean the franchisor's "subjective good faith" and not the objective reasonableness of the franchisor's acts nor the alleged impact of those acts on any particular franchisee. *Bellmore* v. *Mobil Oil Corp.*, 524 F.Supp. 850 (D. Conn. 1981), *aff'd*, No. 81-7491 (2d Cir. 1981); *Ferriola* v. *Gulf Oil Corp.*, 496 F.Supp. 158 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3rd Cir. 1981). See also, *Tiller* v. *Amerada Hess Corp.*, Nos. 81-1652-3 and 81-1653-3 (D.S.C. Nov. 12, 1981); *Munno* v. *Amoco Oil Co.*, 488 F.Supp. 1114 (D. Conn. 1980); *Pearman* v. *Texaco, Inc.*, 480 F.Supp. 767 (W.D. Mo. 1979).

The Court of Appeals erroneously found from the following substantial evidence that petitioner's change in lease terms was not done in good faith:

(1) respondent's monthly rent increased from $130.77 to $650.00[1];

(2) petitioner's failure to provide the figures so that the court could calculate the franchisee's rent[2];

(3) respondent was the only dealer in Oklahoma City to refuse the new marketing program[3];

---

[1] Defendant's [petitioner's] Exhibit 5 attached as Appendix H shows that the actual rent increase would have been $54.00.

[2] Petitioner was never asked to provide figures. Petitioner responded appropriately to each interrogatory as it was framed and to all questions at trial. See Plaintiff's [respondent's] Exhibit 8, Interrogatory 3; Trial Transcript, p. 103, ln. 4 through p. 104, ln. 21 and p. 140, ln. 23 through p. 141, ln. 20 (Appendix I).

[3] Such evidence is supportive of petitioner's position that the new program was offered in good faith and normal course of business.

(4) respondent had participated in the 1976 lawsuit that resulted in the court-approved lease[4];

(5) petitioner did not provide the court with the evidence of respondent's position vis-a-vis the other dealers.[5]

Examination of the above clearly reveals not only that the Court of Appeals did not apply the correct legal standard to review the determination of petitioner's subjective good faith, but also made serious oversights in its review of the record. The court looked only at the *effect* of petitioner's actions on respondent. This is clearly erroneous under the "subjective good faith intent" of franchisor standard in *Bellmore, Ferriola, Tiller, Munno* and *Pearman, supra.*

The courts below ignored the clear weight of the evidence in finding that petitioner's change of lease terms was not in good faith. The record reveals the new marketing program was first offered in February 1977, almost a year before it was first offered to respondent. It was offered to and accepted by all of petitioner's franchisees except respondent. Respondent testified that he did not agree to the new lease simply because he did not like the amount of

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[4] The record is devoid of any evidence to support this inference by the court. Unrebutted testimony of defendant-petitioner's witness is that respondent ". . . always did us a good job. So we would just like to retain him in the service station, if at all possible." Trial Transcript, p. 140, lns. 19-22 (Appendix J).

[5] Plaintiff's [respondent's] Exhibit 9A shows precisely what respondent's position vis-a-vis the other dealers would have been had he agreed to the new terms (Appendix K).

the rent. Respondent's counsel in closing argument stated that the changes in the franchise relationship were not made from "bad motive", yet implied that respondent should have been treated differently from other dealers because his client was such a bad businessman that he had to take another job to support the station.

The Court of Appeals erred in failing to reverse and remand this matter to the trial court for directed verdict, judgment notwithstanding the verdict, or new trial.

CONCLUSION

The decision of the Court of Appeals for the Tenth Circuit in this matter is arbitrary, erroneous, in disregard of better reasoned authority and in conflict with decisions of the Courts of Appeal for the First, Second, and Third Circuits. For these reasons, the issuance of this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

January, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the above and foregoing Petition for a Writ of Certiorari were mailed by certified mail, postage fully prepaid, this 20th day of January, 1982, to all parties required to be served to-wit:

Jeff R. Laird, *Esq.*
Laird, Laird, Heller and Mildfelt
4300 Classen Boulevard
Oklahoma City, Oklahoma 73118

Carolyn Gregg Hill

Carolyn Gregg Hill

Appendix

APPENDIX A

[Filed Sept. 24, 1981]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LEON THOMPSON, Plaintiff-Appellee, v. KERR-McGEE REFINING CORPORATION, Defendant-Appellant.	)	No. 79-2311

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
Civil 78-0955-E

Jeff R. Laird of Laird & Laird, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Carolyn G. Hill (Richard F. Campbell III and B. J. Zimmerman were with her on the brief), Oklahoma City, Oklahoma, for Defendant-Appellant.

Before DOYLE and LOGAN, Circuit Judges, and TEMPLAR,* District Judge.

TEMPLAR, Senior District Judge.

This case involves the interpretation and application of the Petroleum Marketing Practices Act (the Act), 15 U.S.C. § 2801 et seq. Kerr-McGee appeals from a jury verdict awarding Leon Thompson, the plaintiff below, $18,500 damages for loss of income resulting from the unlawful nonrenewal of his franchise relationship with Kerr-McGee.

*Honorable George Templar, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

As a preliminary matter, we consider some of the circumstances under which a district judge may grant a motion to vacate under Rule 60(b), F.R.Civ.P. We then consider whether the franchisee has a right to a jury trial of causes of action arising under the Act, what the implications should be of a district court's decision not to grant the preliminary injunction provided in the Act, and whether the notice and summary statement provisions require strict compliance. Finally, we determine whether there was sufficient evidence to support a verdict for the franchisee.

BACKGROUND

Leon Thompson, the plaintiff and appellee, had operated a Kerr-McGee service station in Oklahoma City since 1968 under a combination station lease and motor fuel consignment agreement. In 1976, a suit filed by Thompson and other dealers against Kerr-McGee was settled. As part of that settlement, Thompson received a two-year lease, under which rent payments were based on his sales. This lease, by its terms, would expire on August 31, 1978.

In February 1977, Kerr-McGee began offering a new package to its dealers. Instead of their rent being based on their sales, the dealers could choose to pay a flat monthly rent plus their entire electric bill. For its part, Kerr-McGee said that dealers choosing this plan would receive a two-cent per gallon discount on motor fuels. All the dealers in the Oklahoma City district signed the new agreement except Thompson, who, on January 22, 1978, signed a statement that he was electing not to modify his lease.

On July 28, 1978, Thompson received a letter from Kerr-McGee which read in pertinent part:

> In the event that you do not indicate your acceptance of the lease and motor fuel consignment by August 15, 1978, this letter is our notice to you that we will not renew your present lease and related agreements which expire August 31, 1978, because of

the failure to agree on new terms, as provided in Section 102(b)(3) of the Petroleum Marketing Practices Act.

A letter, hand-delivered on August 23, 1978, gave notice of unconditional nonrenewal. Thompson continued to operate the station, pursuant to a court order, until September 21, 1978.

STATUTORY SCHEME

15 U.S.C. § 2802(b)(1) provides:

> Any franchisor may terminate any franchise (entered into or renewed on or after June 19, 1978) or may fail to renew any franchise relationship, if—
>
> (A) the notification requirements of section 2804 of this title are met; and
>
> (B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

The notification requirements of Section 2804[1] provide that the notice shall be in writing, shall be posted by certified mail or personally delivered to the franchisee, and

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[1] Section 2804 provides:

> Notification of termination or nonrenewal of franchise relationship—General requirements applicable to franchisor
>
> (a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship—
>
> (1) in the manner described in subsection (c) of this section; and
>
> (2) except as provided in subsection (b) of this section, not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

shall contain a statement of intention not to renew the franchise together with the reasons for nonrenewal, the effective date of the nonrenewal, and a summary statement to be prepared by the Secretary of Energy. 15 U.S.C. § 2804(c). The summary statement is to contain a concise summary of the Act and a statement of responsibilities, remedies, and relief available. 15 U.S.C. § 2804(d)(1). The summary statement is to be furnished within five days after its publication in the Federal Register. 15 U.S.C. § 2804 (d)(2). The notification must be given no less than ninety days prior to the nonrenewal, except that in cases where notice cannot be reasonably given that much in advance,

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[1] (Continued)

Additional requirements applicable to franchisor

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2) of this section—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination or any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 2802(b)(2)(E) of this title or section 2803(c)(2) of this title, the franchisor shall—

the notice must be given on the earliest date on which notice is practicable. 15 U.S.C. § 2804(b).

Section 2802 provides that one ground for nonrenewal is the failure of the franchisor and franchisee to agree to changes in or additions to the provisions of the franchise, provided that the changes or additions are made in good faith and in the normal course of business and the purpose

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[1] (Continued)

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

Manner and form of notification

(c) Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination on nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d) of this section.

Preparation, publication, etc., of statutory summaries

(d)(1) Not later than 30 days after June 19, 1978, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this subchapter, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this subchapter.

of the changes or additions is not to prevent the renewal of the franchise relationship. 15 U.S.C. § 2802(b)(3)(A).[2]

Section 2805 provides for a civil enforcement mechanism in the district courts. The court has the power to grant equitable relief, including preliminary injunctions, to the franchisee. 15 U.S.C. § 2805(b). The franchisee has the burden of proving the nonrenewal; the franchisor then has the burden of going forward with evidence that the nonrenewal was for a permissible reason and that the notice requirements were satisfied. 15 U.S.C. § 2805(c). If successful, the franchisee shall be awarded actual damages, expenses, and attorney's fees; he may also be awarded exemplary damages. 15 U.S.C. § 2805(d).

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[1] (Continued)

(2) In the case of summaries required to be furnished under the provisions of section 2802(b)(2)(D) of this title or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions. Pub.L. 95-297, Title I, § 104, June 19, 1978, 92 Stat. 329.

[2] Section 2802(b)(3)(A) provides:

(3) For the purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

I

Thompson filed his complaint on August 31, 1978. The following day, the action was removed to federal court. On October 10, 1978, Thompson's attorney withdrew, and the court, by minute order, gave Thompson twenty days during which to obtain new counsel. Twenty-four days later, on November 3, Kerr-McGee filed a motion to dismiss for failure to comply with that order. An *ex parte* hearing was held on that same day and the motion was granted.

On December 19, 1978, Thompson filed a motion to vacate under Rule 60. The court granted this motion on the ground of excusable neglect. *See*, Rule 60(b)(1), F.R. Civ.P.[3] Thompson had taken the file to James Mitchell, another attorney. Mitchell had told Thompson that he was hopeful of negotiating a settlement with Kerr-McGee in which event it would be unnecessary to obtain an attorney of record. On November 6, after negotiations had apparently failed, he informed Thompson that he would be unable to represent him because of other commitments.

Kerr-McGee claims that the trial court should not have granted Thompson's motion to vacate the dismissal for failure to prosecute. It claims that the motion should have been treated as a motion to alter or amend a judgment, under Rule 59(e). Such a motion must be served not later

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[3] Rule 60(b) provides, in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct of an adverse party; . . . The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

than ten days after the entry of judgment. Alternatively, Kerr-McGee claims that the motion must be filed within a reasonable time and that case law has established a reasonable time as being the time in which notice of appeal must be filed (the thirty-day rule). *See, Gila River Ranch, Inc.* v. *United States*, 368 F.2d 354 (9th Cir. 1966); *Hoffman* v. *Celebrazze*, 405 F.2d 833 (8th Cir. 1969).

Whether we would consider this as excusable neglect is not the issue on appeal. This is because a motion to vacate under Rule 60(b) is directed to the discretion of the court entering the judgment, not to the discretion of the Court of Appeals. Our review is limited to determining whether the district court abused its discretion. *Appleton Electric Co.* v. *Graves Truck Lines, Inc.*, 635 F.2d 603, 611 (7th Cir. 1980). Rule 60(b) gives the court a grand reservoir of equitable power to do justice in a particular case. That rule should be liberally construed when substantial justice will thus be served. *Pierce* v. *Cook & Co.*, 518 F.2d 720, 722 (10th Cir. 1975) (*en banc*).

The trial judge was furnished with an affidavit describing how the plaintiff had relied on his attorney's statement that negotiations were in progress. The affidavit further related that Thompson had been present during some of the negotiations and had seen Attorney Mitchell acting in his behalf. We believe that the district court showed sound judgment in vacating the dismissal for want of prosecution, especially considering the short period of time, less than five months, during which the case had been on file.

The cases cited by the defendant in support of the thirty-day rule, *Gila River Ranch* and *Hoffman*, both deal essentially with motions to vacate for mistakes of law. A motion to vacate should not serve as a substitute for an appeal; nor should it serve as a means of extending the time in which an appeal may be taken. Construing a reasonable time as being up to one year when the basis for the motion is a mistake of law creates the anomolous situ-

ation of a party seeking to correct an error of law in the district court after the time for filing notice of appeal has expired. The thirty-day rule cannot apply to all Rule 60(b) motions because the language of the rule itself contemplates a reasonable time being as long as one year. "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order or proceeding was entered or taken."

We hold that a reasonable time for filing a motion to vacate for reason of excusable neglect may exceed thirty days and that the district court did not abuse its discretion in granting the motion herein.

II

Kerr-McGee argues that the district court erred in granting Thompson's demand for a jury trial. Kerr-McGee points to provisions of the Act setting out equitable remedies and determinations to be made by the court. *See*, 15 U.S.C. § 2805(d)(1)(C), 2805(b)(1) and 2805(d)(2). None of these provisions deal with actual damages, the remedy which the plaintiff sought and received.

If any of the claims in issue are legal rather than equitable, then the right to a jury trial on those claims is not lost and cannot be infringed upon. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970); *United States* v. *New Mexico*, 642 F.2d 397 (10th Cir. 1981). So, if any of the plaintiff's claims are legal rather than equitable, then the trial court did not err in granting a jury trial on those claims. Kerr-McGee's statutory citations do not show that the only relief available under the Act is equitable.

The authority for an award of actual damages is found in Section 2805(d)(1)(A).

> If the franchisee prevails in any action under subsection (a) of this section, such franchisee shall be entitled—

> (A) Consistent with the Federal Rules of Civil Procedure, to actual damages; . . .

There is no language in the statute providing for a jury trial, and the legislative history is silent on the matter. *See,* 1978 U.S. Code Cong. & Adm. News, p. 873.

Some courts have granted jury trials in Petroleum Marketing Practices Act cases. *See, e.g., Sexe* v. *Husky Oil Co.,* 475 F.Supp. 135, 137 (D.Mont. 1979). Apparently, the right to a jury trial was not questioned therein.

A similar question faced the Supreme Court in *Curtis* v. *Loether,* 415 U.S. 189 (1974). That case presented the question whether either the Civil Rights Act or the Seventh Amendment requires a jury trial upon demand in an action for damages and injunctive relief under 42 U.S.C. § 3612, which authorizes private plaintiffs to bring civil actions to redress violations of the Fair Housing Act. That Act provided that the court might grant as relief a permanent or temporary injunction, a temporary restraining order, or an award of actual and punitive damages.

The court concluded:

> The Seventh Amendment [right to jury trial] does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.
>
> * * * *
>
> When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be made available if the action involves rights and remedies of the sort typically enforced in an action at law.

Id., at 194-195.

A suit for money damages is unmistakably an action at law triable to a jury. *Ross* v. *Bernhard*, *supra*, at 533; *Dairy Queen, Inc.* v. *Wood*, *supra*, at 476. Congress did not limit the right to trial by jury if the claimant sought actual damages. If Congress had intended to limit the right, it could have drafted a section similar to 15 U.S.C. § 2805 (d) (2), which reads:

> The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by the jury.

Absent the limitation of the above section, which is in derogation of the common law, the issue of exemplary damages also would be triable to a jury. 25 C.J.S., *Damages* § 117, p.1107.

We hold that the franchisee has a right to a jury trial for actual damages, upon demand, on his claim, under the Petroleum Marketing Practices Act.

III

Kerr-McGee claims that the district court erred in denying its motion for summary judgment and its 12(b)(6) motion because the court had already implicitly made the determinations necessary for granting those motions. Kerr-McGee claims this determination was made when the federal court dissolved the temporary restraining order. (Kerr-McGee suggests additional reasons why it should have been awarded summary judgment. We consider those in Part V.)

15 U.S.C. § 2805(b)(2) provides the standard for determining when the court must issue a preliminary injunction or temporary restraining order.

> (2) Except as provided in paragraph (3), in any action under subsection (a) of this section, the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exists sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

Kerr-McGee accurately states that the first condition, termination and nonrenewal of the franchise, was satisfied and could not have been the basis for the denial of the injunctive relief. Likewise, it is unlikely that the third condition, involving comparisons of relative hardship, was not satisfied. Therefore, the probable reason for dissolving the temporary restraining order was that the franchisee did not demonstrate the existence of "sufficiently serious questions going to the merits to make such questions a fair ground for litigation." If that be true, according to the defendant, its motion for summary judgment should have been granted because there are no material issues of fact and the defendant should have been entitled to judgment as a matter of law. *See,* Rule 56(c), F.R.Civ.P. The defendant further argues that a 12(b)(6) motion to dismiss should have been granted because the complaint did not set out any claim upon which relief could be granted.

What makes this issue unusual is that the court, which had earlier dissolved the temporary restraining order, later entered a verdict for the franchisee. An examination of almost thirty cases dealing with the Petroleum Marketing

Practices Act reveals no cases in which the court awarded damages after it had denied preliminary equitable relief.

We have found nine published cases in which motions for preliminary injunctions were denied. *Cf., Frisard* v. *Texaco, Inc.*, 460 F.Supp. 1094 (E.D.La. 1978); *Saad* v. *Shell Oil Co.*, 460 F.Supp. 114 (E.D.Mich. 1978); *Malone* v. *Crown Central Petroleum Corp.*, 474 F.Supp. 306 (D.Md. 1979); *Walters* v. *Chevron U.S.A., Inc.*, 476 F.Supp. 353 (N.D.Ga. 1979), *aff'd*, 615 F.2d 1135 (5th Cir. 1980); *Kesselman* v. *Gulf Oil Corp.*, 479 F.Supp. 800 (E.D.Pa. 1979); *Pearman* v. *Texaco, Inc.*, 480 F.Supp. 767 (W.D.Mo. 1979); *McFadden* v. *Amoco Oil Co.*, 486 F.Supp. 274 (D.S.C. 1979); *Ferriola* v. *Gulf Oil Co.*, 496 F.Supp. 158 (E.D.Pa. 1980), *aff'd*, No. 80-2589 (3rd Cir. 3/18/81, unpublished); *Haynes* v. *Exxon Corp.*, 512 F.Supp. 543 (E.D.Tenn. 1981). In these decisions, the denial of a preliminary injunction was never considered sufficient basis for granting summary judgment.

In *Pearman*, the plaintiff was given fifteen days in which to notify the court whether it intended to present additional evidence on its motion for a permanent injunction. The court did not presume that the plaintiff had already presented all the evidence available on the issue. In *McFadden*, summary judgment was later granted, after an extensive discussion of the merits. The court therein did not consider its denial of the motion for a preliminary injunction to be sufficient support for granting summary judgment for the franchisor. In most of these decisions, the court does not reveal what is to happen to the underlying action after it denies the preliminary injunction.

In *Penn* v. *San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975), we observed that the object of a preliminary injunction is to preserve the status quo pending litigation on the merits. This is quite different from finally determining the cause itself. It was improper for the district court therein to base its denial of the permanent injunction on the earlier denial of the temporary restraining

order without providing the plaintiff the opportunity to present its entire case.

We then quote from 7 Moore, *Federal Practice and Procedure*, ¶65.04(4) as follows:

> What is required is that the parties be given a full opportunity to present evidence in the case. At a hearing on the application for a temporary injunction it is not necessary to establish to a certainty that the plaintiff is entitled to relief on the merits, but rather that his success is probable. (Footnote omitted.) A plaintiff putting on his case for temporary relief may hold back evidence, or, indeed, his case may not be fully developed.

528 F.2d at 1187.

The plaintiff in *Penn* did not present his full case at the hearing on the preliminary injunction because he had no notice nor notion that the hearing would be transformed into a trial on the merits. If summary judgment had been granted on the basis of the dissolution of a state court's temporary restraining order, in the instant case, the same objection would apply. *See, Valdez* v. *Applegate*, 616 F.2d 570, 572 (10th Cir. 1980). The plaintiff herein could not have guessed that the dissolution of the temporary restraining order would be transformed into the basis for a dismissal or a grant of summary judgment. If he had, the plaintiff could have presented the evidence which later resulted in a verdict in his favor.

We hold that the district court did not err in denying the defendant's motion for summary judgment and for dismissal under Rule 12(b)(6).

IV

Kerr-McGee argues that the district judge should have ordered a new trial because the damage award was clearly excessive. A verdict regarding the amount of damages should be upheld unless it is clearly erroneous or there is no evidence to support it. *Hudson* v. *Smith*, 618 F.2d 642, 646 (10th Cir. 1980). When the cause and existence of damages have been established with the requisite certainty, recovery will not be denied because the amount of such damage is difficult of ascertainment. A reasonable basis for computation and the best evidence available under the circumstances is sufficient. *A to Z Rental, Inc.* v. *Wilson*, 413 F.2d 899, 908 (10th Cir. 1969). *See also, King & King Enterprises* v. *Champlin Petroleum Co.*, ... F.2d ....., No. 80-1630 (10th Cir., August 3, 1981).

In its verdict, the jury awarded the plaintiff damages of $18,500. The plaintiff had presented evidence that his average income from the operation of his station over the nine-year period 1969-1977 was $249.37 per month. An award of $18,500 would approximate the plaintiff's income for six years. The plaintiff, at the time of the nonrenewal, was 44 years old. It seems reasonable to believe that, absent the nonrenewal complained of, he could have continued to operate his service station for at least six more years and earned at least as much income as the jury's award of damages.

A federal judge has broad discretion in granting or refusing to grant a motion for a new trial. His decision will not be reversed absent a gross abuse of discretion. *Holmes* v. *Wack*, 464 F.2d 86, 89 (10th Cir. 1972). The trial judge did not abuse his discretion. The jury's award was not so excessive as to shock the judicial conscience and raise an irresistable inference that passion, prejudice, corruption or other improper cause invaded the trial. Thus, the jury's determination of damages was properly considered inviolate. *See, Metcalfe* v. *Atchison, Topeka & Santa Fe Railway Co.*, 491 F.2d 892, 898 (10th Cir. 1974).

V

The trial court submitted the issues presented by the evidence with appropriate instructions to the jury, to which no objection was made by the defendant.[4]

Kerr-McGee argues that the court erred in refusing to direct a verdict and in refusing to order judgment n.o.v. in its favor. These motions are judged by the same standard. The question is not whether there is no evidence supporting the party against whom the motion is made, but

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[4] The pertinent instructions of the court were these:

For purposes of this case, the Act provides two conditions upon which nonrenewal of a franchise relationship is permitted. These are:

1. If the notification requirements of the Act are met; *and*,
2. If the nonrenewal is based upon a ground described in the Act.

These two conditions will be described in the subsequent instructions.

You are instructed that the Act in question requires that prior to the nonrenewal of any franchise relationship, the franchisor (here, the defendant) furnish notification of such nonrenewal to the franchisee (here, the plaintiff) which:

1. is in writing, and
2. is posted by certified mail or personally delivered to the franchisee, and
3. contains
   a) a statement of intention not to renew the franchise relationship, together with the reasons therefor, and
   b) the date on which such nonrenewal takes effect, and
   c) a summary statement of the provisions of the applicable law, including a statement of the respective responsibilities of, and the remedies and relief available to the franchisor and franchisee.

In this regard, you are instructed that the "summary statement" was not published in the Federal Register until August 30, 1978, and was, accordingly, unavailable to the defendant prior to that date. This

whether there is evidence upon which the jury could probably find a verdict for that party. The court must view the evidence most favorably to the party opposing the motions and give that party the benefit of all reasonable inferences from the evidence. The underlying philosophy is one of minimizing interference with the jury. *Yazzie* v. *Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977).

The reviewing court is not at liberty to set aside the jury verdict merely because the reviewing judges feel that the opposite result seems more reasonable. *Frank* v. *Bloom*, 634 F.2d 1245, 1254 (10th Cir. 1980). The comments of the district judge that he might have decided in favor of the defendant if he had been the finder of fact are not germane to our decision.

The Act provides that after the franchisee has proven that the lease has not been renewed, the franchisor shall

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[4] (Con.inued)

situation was contemplated by the Act, which provides that the summary may be furnished not later than five days after it is published rather than at the time of notification.

It is uncontroverted that the summary statement was not furnished by the defendant to the plaintiff within the five-day period. Defendant contends, however, that the plaintiff, having commenced this suit on August 31, 1978, knew or had notice of his rights and remedies and was not prejudiced by defendant's failure to furnish the summary statement.

It is for you the jury to determine, from all the facts and circumstances appearing before you, whether defendant's failure to provide the summary statement in question was reasonable or if such deprived the plaintiff of adequate notification.

You are further instructed that the Act provides that the above-outlined notification shall be given not less than 90 days prior to the date on which the nonrenewal is to take effect. It is undisputed that the defendant did not give this 90-day notice to the plaintiff.

You are told that the Act, which went into effect on June 19, 1978, provides that under circumstances in which it would not be reason-

have the burden of going forward with evidence to establish that the termination was for a permissible reason under Section 2802(b)(2) or (3) and that the franchisor complied with the notice requirements of Section 2804. 15 U.S.C. § 2805(c). We find no evidence that Kerr-McGee complied with the notice requirements.

The effective date of the Act was June 19, 1978. On July 28, Thompson received a letter from Kerr-McGee that

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[4] (Continued)

able for the franchisor to furnish notification prior to the 90-day period, then the franchisor shall furnish notification to the franchisee on the earliest date on which furnishing of such notification is reasonably practicable.

What is "reasonable" is to be determined by you upon a consideration of all the facts, circumstances and evidence appearing in this case.

The Petroleum Marketing Practices Act provides that the following is grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor (or defendant) and the franchisee (or plaintiff) to agree to changes or additions to the provisions of the franchise, if—

1. such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; *and*
2. such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

In determining whether the defendant has acted in "good faith," you are told that the good faith test within the context of this Act is meant to preclude sham determinations from being used as an artifice for nonrenewal. As such, good faith means honesty in fact in defendant's conduct, without fraud or dishonest purpose.

You are further instructed that in order to find that the determination was made "in the normal course of business," it must be found that the determination was a result of the franchisor's normal decision-making process, as applied equally to those it does business with.

if he did not indicate his acceptance of the lease and motor fuel consignment by August 15, 1978, Kerr-McGee would not renew his present lease. On August 23, 1978, Thompson received a letter giving notice of unconditional nonrenewal. The lease expired on August 31, 1978, thirty-four days after the first notice.

It is obvious from this time sequence that Kerr-McGee did not give the requisite ninety days' notice, nor was notice given as soon as practicable. Kerr-McGee did not give any sort of notice until 39 days after the Act became effective. Furthermore, Kerr-McGee did not furnish a summary statement to Thompson as required by the Act. On August 30, 1978, the summary statement was published in the Federal Register. Thompson should have received it within five days of August 30, 1978.

Those district courts which have considered the issue have concluded that the notice requirement must be strictly followed. *Blankenship* v. *Atlantic Richfield Co.*, 478 F.Supp. 1016, 1018 (D.Ore. 1979), *Davy* v. *Murphy Oil Co.*, 488 F. Supp. 1013, 1016 (W.D.Mich. 1980), *Daniels* v. *Dilmar Oil Co.*, 502 F.Supp. 178, 181 (D.S.C. 1980). Compliance with the summary statement requirement is also mandatory. *Scheele* v. *Mobil Oil Corp.*, 510 F.Supp. 633, 636 (D.Mass. 1981). We agree that strict compliance with both is mandatory.

In discussing the Migratory Bird Treaty Act, we have said:

> It is a cardinal tenet of statutory construction that statutes are to be construed to effectuate the intent of the enacting body, and that in construing a statute, the court first looks to the language of the statute. Where the language is clear and the purpose appears with reasonable certainty, there is no need to resort to rules of construction to ascertain its meaning.

United States v. *Ray*, 488 F.2d 15, 18 (10th Cir. 1973).

The language is clear that notice shall be given at least ninety days prior to the nonrenewal if practicable. It was not erroneous for the court below to determine that it would have been practicable to give notice much nearer to the effective date of the Act. It stretches credibility to assume that Kerr-McGee was unaware of this statute prior to sending its July 28 notice.

The requirement of furnishing a summary statement involves no judgment by the court as to practicability. The inquiry is simply whether the statement was furnished not later than five days after its publication. 15 U.S.C. § 2804 (d) (2). In so providing, Congress considered the plight of franchisors immediately after the Act became effective and determined a practicable deadline for interim notice of the contents of the Act. This court does not have the power to blot out these timing requirements as to notice and summary statement. The equitable powers in Section 2805 relate only to the plaintiff's remedies. If Congress had intended the courts to have the power to cure or waive a notice defect, it would have so provided in Section 2804 which sets out the notice provisions. *See, Blankenship* v. *Atlantic Richfield Co., supra.*

Furthermore, we believe that there is sufficient, credible evidence to support the jury's verdict for Thompson on the basis that the nonrenewal was not for a reason outlined in Section 2802(b)(3). Kerr-McGee stated that the reason for the nonrenewal was failure to agree on new terms. Thompson claims that the changes or additions were not made in good faith. 15 U.S.C. § 2802(b)(3)(A)(i).

The interrogatories answered by the defendant reveal that Thompson's monthly rent would increase to $650.00. Before the increase, Thompson's rent, which averaged $130.77, was less than all but one station; after the increase, it was higher than half the Kerr-McGee stations in Oklahoma City.

Kerr-McGee listed four numerical factors used in determining the station rent for six sample stations, including Thompson's. The sum of these factors did not total the station rents. Kerr-McGee attempted to explain this by saying that there was an additional factor called an "economic factor" which was not included in its earlier list of factors. Kerr-McGee did not offer to provide the figures from which it calculated the economic factor.

Thompson suggests that one reason Kerr-McGee bargained with him in less than good faith was his earlier lawsuit against Kerr-McGee. He was also the only dealer in Oklahoma City to refuse the new package leases.

Kerr-McGee presented evidence that it attempted to explain to Thompson that his rent, after deducting a two-cent per gallon wholesale discount, would increase only $54. What Kerr-McGee does not reveal is Thompson's position vis-a-vis the other dealers.

We hold that the statutory provisions as to notice of nonrenewal, including the summary statement, under the Petroleum Marketing Practices Act, are to be strictly complied with and that Kerr-McGee failed to do so. We further hold that the trial judge did not err in refusing to grant Kerr-McGee's motions for directed verdict and for judgment n.o.v. There was substantial evidence that Kerr-McGee's change of the lease terms was not in good faith.

AFFIRMED.

APPENDIX B

[Filed Nov. 16, 1981]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM — September 24, 1981

Before Honorable William E. Doyle, Honorable James K. Logan, Circuit Judges, and Honorable George Templar, District Judge*.

LEON THOMPSON, Plaintiff-Appellee,	)	JUDGMENT
v.	)	
	)	No. 79-2311
KERR-McGEE REFINING CORPORATION, a Delaware Corporation, Defendant-Appellant.	)	(D.C. No. 78-0955-E)

A true copy
Teste
Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit
By
(s) *Opal A. Carter*
Deputy Clerk

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

*Of the United States District Court for the District of Kansas, sitting by designation.

HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Chief Deputy Clerk

APPENDIX C

SEPTEMBER TERM — November 13, 1981

Before Honorable William E. Doyle, Honorable James K. Logan, Circuit Judges, and Honorable George Templar, District Judge*.

LEON THOMPSON, Plaintiff-Appellee,	)	
v.	)	No. 79-2311
KERR-McGEE REFINING CORPORATION, a Delaware Corporation, Defendant-Appellant.	)	

This matter comes on for consideration of appellant's motion to stay issuance of mandate pending application to the Supreme Court for writ of certiorari in the captioned cause.

Upon consideration whereof, it is ordered that the motion to stay issuance of mandate is denied.

HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Chief Deputy Clerk

*Of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
[Letterhead omitted in printing]

November 13, 1981

Herbert T. Hope, Clerk
U.S. District Court
Room 3210 — U.S. Courthouse
Oklahoma City, OK 73102

Re: No. 79-2311 — Leon Thompson v. Kerr McGee Refining Corporation, etc.
(D.C. No. 78-0955-E)

Dear Mr. Hope:

Pursuant to Rule 41 of the Federal Rules of Appellate Procedure, effective July 1, 1968, as amended, I am enclosing a certified copy of the judgment, and a copy of the opinion, which shall constitute the mandate of this Court. You will please file this mandate in the records of your court immediately upon receipt of it by direction of this Court. I am also enclosing a form of receipt for you to sign and return to this office.

The original record on appeal will be returned to you under separate cover.

Sincerely yours,
HOWARD K. PHILLIPS, Clerk

By (s) *Robert L. Hoecker*
Chief Deputy Clerk

HKP: oac
Enclosures

cc: Carolyn G. Hill, B. J. Zimmerman, Richard F. Campbell, III, Kerry-McGee Center, P. O. Box 25861, Oklahoma City, OK 73125

Jeff R. Laird, Laird & Laird, 4300 Classen Blvd., Oklahoma City, OK 73118

APPENDIX E

SEPTEMBER TERM — October 26, 1981

Before Honorable Oilver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges and Honorable George Templar, District Court Judge*.

LEON THOMPSON, Plaintiff-Appellee,	)	
v.	)	
	)	No. 79-2311
KERR-McGEE REFINING CORPORATION, a Delaware Corporation, Defendant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

(s) *Howard K. Phillips*
HOWARD K. PHILLIPS, Clerk

*Of the United States District Court for the District of Kansas, sitting by designation.

APPENDIX F

[Filed Nov. 19, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEON THOMPSON, Plaintiff,	)	
-vs-	)	Case No.
	)	CIV-78-0955-E
KERR-McGEE REFINING CORPORATION, Defendant.	)	

ORDER

The Court, having considered the briefs and argument of counsel, finds that the Defendant's alternative motions for judgment notwithstanding the verdict or for a new trial should be and the same hereby are denied.

Defendant's request for stay of judgment pending appeal is granted, conditioned upon the filing of an approved supersedeas bond on or before December 15, 1979.

Done in open court November 15, 1979.

(s) *Luther B. Eubanks*
UNITED STATES DISTRICT JUDGE

APPROVED:

(s) *Jeff R. Laird*
Attorney for Plaintiff

(s) *Carolyn G. Hill*
Attorney for Defendant

APPENDIX G

[Filed in Open Court Sept. 27, 1979]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

LEON THOMPSON, Plaintiff,	)	
-vs-	)	CIV-78-0955-E
KERR-McGEE REFINING CORPORATION, Defendant.	)	

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Luther B. Eubanks, District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff Leon Thompson, recover of the Defendant, Kerr-McGee Refining Corporation, the sum of $18,500.00 as damages and the additional sum of $7,500.00 as attorney fees, with interest thereon at the rate of ten percent per annum, as provided by law, and his costs of action.

DATED at Oklahoma City, Oklahoma, this 27 day of September, 1979.

(s) *Luther B. Eubanks*
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON SEP 27 1979

APPROVED AS TO FORM:

(s) *B. J. Zimmerman*
Attorney for Defendant,
Kerr-McGee Refining Corporation

(s) *Jeff R. Laird*
Attorney for Plaintiff,
Leon Thompson

APPENDIX H

DEFENDANT'S EXHIBIT 5

Total Gallons Sold by Plaintiff (117 Months)	Average Old Rent (1¢ per Gallon)	New Flat Rent	Average Reduced Price Per Gallon	Average Monthly Cost Savings
2,626,000	22,400 x 1¢ = $224	$650	2¢ x 22,400 = $448	

New Rent	$650	True Rent	$202
Cost Savings	−448	Electricity	+ 76
True Rent	$202	Lease Payment	$278

Lease Payment	$278
Old Rent	224
Actual Increase	$ 54

Actual Increase in Lease Payments Under Renewal Agreements

APPENDIX I

PLAINTIFF'S EXHIBIT 8

* * *

INTERROGATORY NO. 3: What is the basis for computing the amount of rent provided in the proposed new lease offered to plaintiff by defendant's letter dated July 24, 1978, including all factors entering into the computation, and precisely how, by whom and by whose direction was it computed?

ANSWER: The amount of rent in the proposed new lease offered to Plaintiff by Defendant on January 20, 1978 and again by Defendant's letter dated July 24, 1978 is based on the ad valorem taxes, depreciation on equipment, amortization of improvements, land value, economic value and maintenance of premises. The rent was computed by the Marketing Administration Department and at the direction of the Branded Petroleum Sales Department in the normal course of business.

* * *

TRIAL TRANSCRIPT

[page 103, ln. 4 through page 104, ln. 21]

Q What items would that figure include? Would it be such things as taxes?

A Yes, ad valorem taxes.

Q And what else would it include?

A It would include depreciation.

MR. LAIRD: I object to what it might include, Your Honor.

Q (BY MR. CAMPBELL:) What does it include?

THE COURT: Go ahead.

THE WITNESS: It includes depreciation on all of our equipment in the service station. It includes ad valorem on personal property taxes as you've mentioned. It includes a maintenance factor that's built upon history as to what the station costs in maintenance. And, also, either a leasehold charge or amortization against our facilities there.

Q (BY MR. CAMPBELL:) What do you mean by leasehold charge?

A Well, a leasehold charge is whereby if we lease the service station or we lease the land and the improvements, that's known as a leasehold charge. What we would pay to someone who owns a property other than Kerr-McGee.

Q Now, I'll refer you to — strike that. Let's go for a moment to Mr. Thompson's station. And I'll ask you what were the components of the rent figure that was proposed for that station?

A It included the four previously discussed factors plus an economic factor.

Q Okay. Well, was this the same group of elements that applied to other stations?

A Absolutely, yes.

Q You used the phrase economic value. Could you explain to us what that means.

A Well, economic value is the value the station, in reference to its business potential.

Q What might you consider in that?

A Well, we might consider traffic flow. We might consider street hinderances like medians, signal lights, the density of the population, if it's a residential section, if it's in a factory section, commercial, the visibility of the service station from oncoming traffic, whether it's an inside location, whether it's a corner location, the competitors in the im-

mediate trade area, the type of facility this is. That's just a few of the factors that we would consider.

[page 140, ln. 23 through page 141, ln. 20]

Q Can you tell us how the rent, these fixed rent figures that came under the new package were figured for stations just in the Oklahoma City area?

A Yes, we received what we call a base rent, which consisted of amortization, depreciation, taxes, and maintenance. And from there we take a survey of the service stations or the areas, et cetera and then we place what we call an economic value on it.

Q What do you mean that you survey? Explain that to the jury.

A By the location, where it's located, the potential traffic, residential, anything that would be beneficial to the service station. We arrive at that and call it the economic value of it.

Q So a station at a good location would pay more rent than a station at a not quite as good location, is that correct?

A That's correct.

Q If a station was in a poor location, what consideration would you give that?

A As we have in any automotive, we've got, you have to take into consideration the location, the traffic, and et cetera, and if it would warrant a reduction in the economic value, then we would place that in there.

APPENDIX J

TRIAL TRANSCRIPT

[page 140, lns. 19-22]

A Because Leon had been with us, or Mr. Thompson had been with us for a period of nine years, and he always did us a good job. So we would just like to retain him in the service station if at all possible.

APPENDIX K

PLAINTIFF'S EXHIBIT 9A

Station # (43)	1(d) Effective date First Flat Rent Lease	1(b) Av. monthly rent for 2 years prior	1(d) Initial Rent on Flat Rent Lease
6503	7-1-78	$176.59	$575
6504	12-15-78	299.73	550
6509	5-29-78	354.91	750
6514	1-4-78	278.51	500
6515	2-4-78	219.89	400
6516	1-5-78	159.64	550
6519	1-10-78	383.98	700
6521	4-24-78	220.27	675
6522	1-12-78	265.74	725
6523	1-15-78	136.16	375
6524	1-12-78	289.17	545
6525	1-6-78	272.59	820
6528	2-1-78	221.97	750
6529	7-1-78	194.29	475
6530	9-1-78	329.13	755
6546	1-13-78	389.35	800
6551	1-16-78	365.25	650
6554	1-4-78	389.89	750
6556	3-3-78	380.08	750
6557	1-16-78	232.29	600
*6560	11-3-78	130.77	550
6562	1-10-78	118.34	510
6563	1-26-78	206.18	505
6564	1-11-78	285.15	790
6566	1-10-78	461.34	750

[APPENDIX]

PLAINTIFF'S EXHIBIT 9A (Continued)

Station # (43)	1(d) Effective date First Flat Rent Lease	1(b) Av. monthly rent for 2 years prior	1(d) Initial Rent on Flat Rent Lease
6567	1-5-78	384.97	800
6568	1-10-78	306.76	650
6569	1-10-78	322.09	500
6573	12-7-78	152.94	600
6574	1-9-78	186.17	500
6583	1-13-78	190.54	480
6584	1-16-78	341.16	750
6587	1-16-78	154.17	650
6588	1-14-78	273.08	650
6589	6-5-78	199.59	520
6590	1-13-78	304.49	750
6593	1-9-78	262.12	450
6596	2-13-78	137.50	500
6598	3-1-78	643.29	700
6609	5-19-78	Purchased from APCO 2-16-78	835
6610	4-25-78	Purchased from APCO 2-16-78	620
6613	2-1-78	270.79	500
6617	3-3-78	133.16	500

Exhibit "A" of Defendant's Response to Plaintiff's Third Interrogatories

Opposition

Office - Supreme Court, U.S.
FILED
FEB 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1375

In the Supreme Court of the United States

OCTOBER TERM, 1981

KERR-McGEE REFINING CORPORATION,
Petitioner,

VERSUS

LEON THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEFF R. LAIRD
Counsel of Record for Respondent
LAIRD, LAIRD, HELLER & MILDFELT
4300 Classen Boulevard
Oklahoma City, Oklahoma 73118
(405) 521-9850

February, 1982

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CERTIFICATE OF SERVICE follows Brief.

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Cases

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LEON THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PREFATORY NOTE

The Petroleum Marketing Practices Act, Subchapter I — Franchise Protection, 15 U.S.C. Sections 2801-2806, under which this action arises, is referred to herein as the Act.

SUMMARY

Petitioner states as grounds for certiorari an alleged conflict between the decision of the Court of Appeals for the Tenth Circuit in this cause, *Thompson* v. *Kerr-McGee Refining Corp.*, 660 F.2d 1380 (10th Cir. 1981), and decisions of other federal courts of appeal with respect to construction and application of (1) notice requirements of

15 U.S.C. §2804(b)(1)(A) and (c) and (2) grounds for renewal stated in 15 U.S.C. §2802(b)(3)(A).

Respondent submits that there is no material conflict between the pertinent appellate decisions either as to notice requirements or grounds for nonrenewal and, therefore, there is no reason to grant certiorari.

NOTICE REQUIREMENTS

Petitioner alleges that there is a conflict between the decision of the Court of Appeals in this case and the decision in *Veracka* v. *Shell Oil Co.*, 655 F.2d 445 (1st Cir. 1981), with respect to whether or not strict compliance with the notice provisions of the Act is mandatory.

The notice provisions involved in this case are: (1) 15 U.S.C. §2804(b)(1)(A), requiring at least 90 days notice of nonrenewal unless such notice "would not be reasonable" and otherwise on the earliest date "reasonably practical", and (2) the requirement of 15 U.S.C. §2803(c)(3)(C) and §2804(d) that a summary statement be furnished with the nonrenewal notice or within five days after publication of the summary in the Federal Register.

In this case the Court of Appeals noted that Petitioner admitted that less than 90 days notice of nonrenewal was given and the summary statement was never furnished, found that the evidence sustained a finding that notice was not given on the earliest date reasonably practical, concluded that Petitioner had not complied with the Act's notice requirements, and stated that strict compliance with the time of notice and summary statement requirements is mandatory. It is noted that the statement concerning

mandatory strict compliance is dictum, as the trial court did not instruct that strict compliance is mandatory but instead instructed the jury to use a standard of reasonableness. (Petition for Certiorari, Appendix A, 16a-18a; 660 F.2d 1389).

The decision of the Court of Appeals for the First Circuit in *Veracka* v. *Shell Oil Co.*, supra, does not deal with failure to comply with the 90 days notice requirement of §2804(b)(1)(A) or with the summary statement requirements of §2803(c)(3)(C) and §2804(d). Instead, insofar as notice is concerned, it deals with applicability of the 120 days notice requirement of §2802(b)(2)(C), which applies only in special circumstances not present in the instant case, and found that requirement not applicable under the facts in the case before it. Nowhere in the First Circuit decision is there any mention of whether or not strict compliance with any notice provision is mandatory.

At page 10, Petition for Certiorari, Petitioner quotes the trial judge in the *Veracka* case as making a finding that "Technical violation of the notice provision Section 2802(b)(2)(C) does not defeat [Shell's] right not to renew the franchise and lease." But the Court of Appeals declined to decide whether or not there was a violation of the notice provision of Section 2802(b)(2)(C) because that provision was not applicable. (655 F.2d 448-450).

There is no conflict between the decision of the Tenth Circuit in this case and the decision of the First Circuit in the *Veracka* case.

GROUNDS FOR RENEWAL —
15 U.S.C. §2802(b)(3)(A)

Petitioner's second allegation of conflict between circuits is with respect to the meaning of "good faith" as used in 15 U.S.C. §2802(b)(3)(A)(i), which permits nonrenewal for failure to agree to changes or additions when "such changes or additions are the result of determinations made by the franchisor [Petitioner] in good faith and in the normal course of business." Petitioner cites *Ferriola* v. *Gulf Oil Corp.*, 496 F.Supp. 158, *affirmed* without opinion, 649 F.2d 859 (3rd Cir. 1981) and *Bellmore* v. *Mobil Oil Corp.*, 524 F.Supp. 850, *affirmed* without opinion (No. 81-7491, 2d Cir. 9/22/81), as construing the statute "to mean the franchisor's 'subjective good faith' and not the objective reasonableness of the franchisor's acts nor the alleged impact of those acts on any particular franchisee" and says that this conflicts with the Tenth Circuit decision in this case. As both *Ferriola* and *Bellmore* were affirmed without decision the district court decisions must be considered.

"Subjective good faith" is Petitioner's language, not the language of the decisions cited. "Subjective good faith" is not mentioned either in the *Ferriola* decision or in the *Bellmore* decision.

A careful reading of the *Ferriola* and *Bellmore* decisions and comparison of them with each other and with the decision in this case discloses no material difference in the way the three courts interpreted "in good faith and in the normal course of business", the language of the statute. It appears clear that all three courts adopted the view stated in the *Bellmore* decision, at 853, "that the es-

sence of improper conduct in franchise negotiations is selective application of a standard practice, or discrimination against an individual dealer." In construing and applying 15 U.S.C. §2802(b)(3)(A), the touchstone in each of the three decisions is discrimination, each considering whether there was sufficient evidence of discrimination against the franchisee-plaintiff to justify a finding that the franchisor-defendant did not act in good faith and in the normal course of business.

There is no material conflict between the decision in this case and the decisions in *Ferriola* and *Bellmore*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JEFF R. LAIRD
Counsel of Record for Respondent
LAIRD, LAIRD, HELLER & MILDFELT
4300 Classen Boulevard
Oklahoma City, Oklahoma 73118
(405) 521-9850

February, 1982

CERTIFICATE OF SERVICE

It is certified that three (3) copies of the above and foregoing Brief in Opposition of Respondent were mailed to Petitioner by depositing the same in a United States Post Office mail box, with first-class postage prepaid, addressed to Counsel of Record for Petitioner, Carolyn Gregg Hill, at Kerr-McGee Center, Post Office Box 25861, Oklahoma City, Oklahoma 73125, on this ..... day of February, 1982.

All parties required to be served have been served.

.....

JEFF R. LAIRD
Counsel of Record for Respondent

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAR 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1375

In the Supreme Court of the United States

OCTOBER TERM, 1981

KERR-McGEE REFINING CORPORATION,
Petitioner,

VERSUS

LEON THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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Counsel for Petitioner

March, 1982

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CERTIFICATE OF SERVICE follows Brief.

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No. 81-1375

In the Supreme Court of the United States

OCTOBER TERM, 1981

KERR-McGEE REFINING CORPORATION,*
Petitioner,

VERSUS

LEON THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

SUMMARY

Petitioner reasserts that this Court should exercise its discretion and grant certiorari in this case. The decision of the United States Court of Appeals for the Tenth Circuit in *Leon Thompson* v. *Kerr-McGee Refining Corporation*, 660 F.2d 1380, arises under a relatively new statute, the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.* Substantial federal issues were decided. This Court has not previously reviewed and decided issues arising under this Act. The decision of the United States Court

* The list of all parties was included in the Petition for Writ of Certiorari filed January 20, 1982.

of Appeals for the Tenth Circuit conflicts with decisions in other circuits. Respondent's Brief in Oppositon erroneously asserts that no such conflict exists. Conflicts between decisions of courts of appeals or between a court of appeals and district courts of other circuits have been found to provide sufficient grounds for granting certiorari. *Butner* v. *United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *Calhoon* v. *Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964), *reh. den.*, 379 U.S. 984, 85 S.Ct. 639, 13 L.Ed.2d 577 (1965); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 638-639 n.8, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974).

NOTICE
15 U.S.C. § 2804

Petitioner disagrees with respondent's assertions that the statements in the opinion of the Court of Appeals concerning mandatory strict compliance with notice provisions are dicta.

On appeal, petitioner asserted that the trial court erred by failing to direct a verdict and grant judgment notwithstanding the verdict. The Court of Appeals examined the evidence of petitioner's actions from the basis of an absolute legal standard — namely, strict compliance with notice provisions is mandatory (Petition for Certiorari, Appendix A, p. 19a). The Court of Appeals then held that it could find no evidence that petitioner complied with the notice requirements because: (a) petitioner did not give notice until 39 days after the Act became effective, and (b) petitioner did not send a summary statement in time for respondent to have received it within five days of its publication on

August 30, 1978 (Petition for Certiorari, Appendix A, p. 19a). The standard of review outlined and applied by the Court of Appeals can hardly be considered dictum.

In holding that strict compliance with the notice provisions was mandatory, the Court of Appeals relied on *Blankenship* v. *Atlantic-Richfield Co.*, 478 F.Supp. 1016 (D Ore. 1979), *Davy* v. *Murphy Oil Corp.*, 488 F.Supp. 1013 (W.D. Mich. 1980), *aff'd*, No. 80-1285 (6th Cir. 1981), and *Daniels* v. *Dilmar Oil Co.*, 502 F.Supp. 178 (D.S.C. 1980). Other litigants have not been held to this standard. *See Veracka* v. *Shell Oil Co.*, No. 80-533-S, slip op. (D. Mass. Nov. 26, 1980), *aff'd*, 655 F.2d 445 (1st Cir. 1981), *Gaspar* v. *Chevron Oil Co.*, 490 F.Supp. 971 (D.N.J. 1980), *Sachi* v. *Mobil Oil Corp.*, No. 79 C 2345 (E.D.N.Y. Nov. 20, 1979), 1980-1 Trade Cases, ¶ 63,044, *Frisard* v. *Texaco*, 460 F.Supp. 1094 (E.D. La. 1978). A conflict exists between the circuits. *Butner, supra, Calhoon, supra, LaFleur, supra.* Certiorari should be granted to resolve this conflict.

GROUNDS FOR NONRENEWAL
15 U.S.C. § 2802(b)(3)(A)

On page 4 of Respondent's Brief In Opposition, respondent states: "'Subjective good faith' is Petitioner's language, not the language of the decisions cited. 'Subjective good faith' is not mentioned either in the *Ferriola*[1] decision or in the *Bellmore*[2] decision." Petitioner disagrees.

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[1] *Ferriola* v. *Gulf Oil Corp.*, 496 F.Supp. 158 (E.D. Pa. 1980), *aff'd*, 649 F.2d 859 (3rd Cir. 1981).

[2] *Bellmore* v. *Mobil Oil Corp.*, 524 F.Supp. 850 (D. Conn. 1981), *aff'd*, No. 81-7491 (2d Cir. 1981).

The words "subjective good faith" are not merely those of petitioner. With the exception of this case, they are the words that all courts deciding the issue have used to describe the franchisor's requisite good faith under § 2802(b)(3)(A) since *Munno* v. *Amoco Oil Co.*, 488 F.Supp. 1114 (D. Conn. 1980). While respondent is literally correct — the three words "subjective good faith" do not consecutively appear in either decision — the phrase was recognized in both as the proper legal standard. The following language from *Bellmore, supra,* is particularly clear in its recognition of the subjective good faith intent standard:

> "Defendant [franchisor] urges the Court to inquire only into its subjective intent, whereas plaintiff contends that the Court is to determine if the proposed lease terms are reasonable, according to an objective standard. The Court concludes that a limited inquiry into subjective intent is mandated by the statute. . . ." At page 852.

Respondent further asserts that there is no material conflict between the good faith intent standard of 15 U.S.C. § 2802(b)(3)(A) applied in the Court of Appeals' decision and the decisions of other circuits. Petitioner disagrees.

The Court of Appeals held that there was sufficient credible evidence to support the jury's verdict that petitioner's change of lease terms was not in good faith (Petition for Certiorari, Appendix A, p. 21a). The opinion sets out the evidence upon which the court relied in making this determination. A review of that evidence clearly reveals that the standard of review applied by the Court of Appeals was to examine only the effects that the proposed changes had on one individual, the respondent. This is

patently contrary to the franchisor's subjective good faith intent standard mandated by *Bellmore, supra, Ferriola, supra, Tiller* v. *Amerada Hess Corp.*, No. 81-1652-3 (D.S.C. Nov. 12, 1981), and outlined in detail in *Drazin* v. *Amoco Oil Co.*, No. 80-2519 (D.D.C. Feb. 25, 1981), 1981-1 Trade Cases, ¶ 64,097, *Munno, supra,* and *Pearman* v. *Texaco, Inc.*, 480 F.Supp. 767 (W.D. Mo. 1979). These cases hold that Congress intended that the franchisor's "subjective good faith intent", not the objective reasonableness, nor the impact of the franchisor's acts on the franchisee, is the proper legal standard of good faith under § 2802(b)(3)(A).

In *Palmieri* v. *Mobil Oil Corp.*, Civ. No. H-81-898, and *Morin* v. *Mobil Oil Corp.*, Civ. No. H-81-928 (D. Conn., Jan. 8, 1982), 42 ATRR 286, a decision not reported at the time the Petition for Certiorari in this case was filed, the Court reaffirms petitioner's assertion that the Court of Appeals did not review the facts of this case pursuant to the proper legal standard of franchisor's subjective good faith intent. In that case, the franchisees asserted that § 2802(b)(3)(A),

> "impose[d] a legal duty on petroleum franchisors like Mobil to act in a reasonable, nonarbitrary manner when dealing with their franchisees and that Mobil ha[d] violated that duty. Mobil argue[d] that the PMPA requires only that a franchisor must not discriminate against individual franchisees, nor should it purposefully act so as to force particular franchisees out of business when negotiating rental terms and policies. . . ." Slip op., p. 1.

The court, after reviewing pertinent sections of legislative history, rejected the "objective reasonableness" test and reaffirmed the subjective good faith intent test. The

court noted that its holding was consistent with the *Munno, supra,* and the *Bellmore, supra,* decisions. The Court concluded that:

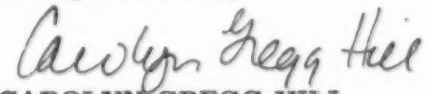
> "... both the legislative history of the PMPA and the recent decisions that have construed that statute indicate quite clearly that the PMPA provides only limited protection for a franchisee, protection from a franchisor's selective and discriminatory application of a rental formula with the intent of forcing that franchisee from the retail petroleum business." Slip op., p. 12.

Contrary to what respondent would like to believe, there is a material conflict between the decisions of the Court of Appeals in this case and the decisions of other courts of appeals and district courts. Certiorari should be granted to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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March, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that three (3) true and correct copies of the above and foregoing Reply Brief of Petitioner were mailed by certified mail, postage fully prepaid, this 9th day of March, 1982, to all parties required to be served to-wit:

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